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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 211.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Petitioner,

—against—

WESTCHESTER SERVICE CORPORATION,

Appellee.

BRIEF FOR PETITIONER.

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—against—

WESTCHESTER SERVICE CORPORATION,

Appellee.

BRIEF FOR PETITIONER.

Opinions Below.

The Circuit Court of Appeals for the Second Circuit, granted appellee's motion for a stay pending arbitration, reversing the order of the District Court for the Southern District of New York, and rendered an opinion which is reported in 70 F. (2d) 297, and which appears at page 73 of the record.

The District Court rendered an opinion, which does not appear to be as yet officially reported. This opinion appears at page 61 of the record.

Jurisdiction.

A petition for a writ of certiorari was filed July 21st, 1934, and granted October 8th, 1934.

Jurisdiction of this Court is based upon Judicial Code, Sec. 240, as amended by the act of February 13th, 1925 (28 U. S. C. A. Sec. 347).

The jurisdiction in the District Court was based upon the diversity of citizenship.

Nature of the Case.

By this writ petitioner seeks to review the order of the Circuit Court, which reversed the order of the District Court, and granted appellee's application for a stay of all proceedings pending arbitration.

The complaint contains two causes of action. The first sought to recover damages for appellee's breach and repudiation of a contract for the sale and delivery of coal, entered into by it with The Hudson Coal Co., petitioner claiming to be the beneficiary designated by the contracting parties to receive the benefits of the said contract (R. 3-7). This cause of action was not involved on appellee's motion for a stay.

The second cause of action seeks to recover damages for appellee's breach and repudiation of a contract entered into by it directly with petitioner. By the terms of the said contract, appellee agreed to purchase from petitioner 75,000 gross tons of anthracite coal, of certain specified sizes, in a period of not less than three nor more than five years. The contract provided further that appellee would order and accept delivery of the coal, during such period, in as equal monthly installments as practicable, it being agreed that delivery of said coal by petitioner and its acceptance by appellee should extend over said period of not less than three nor over five years, in as even a manner as practicable (R. 8).

The complaint then alleges that under this contract, appellee was obligated to order and accept from

petitioner, on the average, at least 1250 gross tons of coal per month. The second cause alleges further that appellee, since December 1st, 1931, without just cause, neglected and refused to order, accept or pay for at least an average 1250 gross tons of coal per month, as required by its agreement, but has ordered quantities of coal greatly below its said average monthly quota, and during several months since said date, has failed to order or accept any coal whatsoever from petitioner; that appellee was in default, under its said agreement, to the extent of approximately 16,173 gross tons of coal, and that prior to the commencement of this action, appellee notified petitioner it would not order, accept or pay for coal as provided in its agreement, and repudiated the same (R. 8-9).

It is then pleaded that petitioner, at all times mentioned, was ready, able and willing to perform the said agreement, with respect to furnishing, selling and delivering coal as required by the agreement, and, would have furnished, sold and delivered the same, but for appellee's said neglect, refusal and repudiation. It is alleged further that there remains to be delivered to appellee, under said agreement, in all, a balance of 52,309 gross tons of coal (R. 9).

The complaint then alleges that petitioner, as appellee well knew, was entitled to and received commissions, under an agreement which it had with The Hudson Coal Co., for all coal sold and delivered by petitioner to appellee, under its contract with the latter. Accordingly, petitioner seeks to recover, under its second cause of action, as damages for appellee's breach and repudiation, commissions in the sum of $9,851.74, which it claims it would have earned if appellee had fully performed its agreement (R. 9-10).

Appellee, after service of the complaint, made a motion addressed to the sufficiency of the *first* cause of action, seeking a dismissal thereof upon the ground that it failed to set forth facts sufficient to constitute a cause of action (R. 17). The District Court granted this motion, holding that petitioner was merely an incidental beneficiary, and as such, could not sue on the contract entered into between appellee and The Hudson Coal Co. An appeal was taken by petitioner from the order and judgment dismissing its said first cause of action, to the Circuit Court of Appeals, Second Circuit. That Court affirmed the said order and judgment, without opinion. A petition for a writ of certiorari to review the said judgment, was denied by this Court, in October, 1934.

Simultaneously with its motion to dismiss the first cause of action, and before answering, appellee moved for an order staying all proceedings under the second cause of action, pending arbitration. This application was predicated upon a clause in the contract between petitioner and appellee, which provided for arbitration. The District Court denied the motion, without prejudice to a renewal thereof, on the ground that it was premature and could not be entertained until issue had been joined by the service of an answer (R. 17-18).

Appellee served its answer on July 27th, 1933, and thereafter renewed its motion for a stay pending arbitration, upon the pleadings and upon the affidavits and papers submitted upon its former motion, and upon an additional affidavit setting forth the proceedings already had. The motion came on to be heard simultaneously with a motion by petitioner to strike out appellee's second separate defense which pleaded the arbitration agreement and petitioner's failure to arbitrate (R. 18).

Appellee's motion was denied by the District Court. Appellee thereupon appealed to the Circuit Court of Appeals, Second Circuit, from the order denying its said application. That Court reversed the said order and granted appellee's motion.

It is claimed in appellee's moving affidavits that a dispute exists between the parties as to the performance of the agreement. In this connection, appellee asserts that, subsequent to the execution of the agreement, it ordered the shipment of coal, from time to time, and that petitioner complied with such orders, to and including the month of December, 1932 (R. 22).

It is stated further in appellee's affidavits that, on January 3rd, 1933, it placed an order for the shipment of seven cars of coal; that thereafter appellee received a letter from petitioner charging appellee with being in default in the placing of orders under the existing contracts and refusing to accept the order in question, unless appellee conceded that the acceptance thereof was without prejudice to petitioner's rights (R. 22-23, 35-36).

It is asserted further in the said affidavits that appellee's vice-president, Mr. Elkind, conversed with petitioner's president, Mr. Goodenough, with reference to the said letter received from petitioner, and urged that appellee was not in default under its contracts. It is claimed that Mr. Goodenough agreed that he saw no reason why his company should not fill the order for the seven cars of coal and agreed to do so (R. 23).

Appellee then states that a letter was received from petitioner's attorneys, declining to ship the coal in compliance with appellee's order. It is claimed that, after receipt of the said letter, appellee's president, Mr. Couzens, again conversed with Mr. Goodenough, and urged that the order be accepted. It is claimed,

also, that, prior to the giving of this order, Mr. Couzens had some discussion with appellee's officers and that no contention was made on the part of petitioner, prior to January 5th, 1933, that appellee was in default in purchasing coal under its agreement (R. 23-24).

The conclusion is then asserted that appellee always has always been ready and willing to arbitrate its dispute with petitioner, in accordance with the contract provisions, and, still is ready and willing to comply with all of the terms of the contract, and to order and accept, within the contract terms, the amount of coal required to be ordered (R. 24).

The contract provisions relating to the arbitration of disputes between the parties, reads as follows:

> "In case any dispute should arise between the Buyer and the Seller as to the performance of the terms of this agreement, such dispute shall be arbitrated and the cost thereof shall be borne equally by both parties. The Buyer and the Seller shall each appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator and the decision of a majority of the three arbitrators shall be final and conclusive on both parties. *In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this arbitration agreement in accordance with the arbitration laws of the State of New York*" (R. 31). (Italics ours.)

The answering affidavits interposed by petitioner, disclose the lack of merit in appellee's application. Thus, it is shown that, at the time the present action was instituted, in March 1933, appellee was in default

to the extent of approximately 16,173 gross tons of coal, even on the basis of a five year term. Appellee's delinquency first occurred in December 1931 (R. 41).

The default continued until the spring of 1932, when petitioner's president, Mr. Goodenough, communicated with appellee's vice-president, Mr. Elkind, and called the latter's attention to the fact that appellee was far behind its quota. Mr. Elkind admitted his company had not been ordering and purchasing coal in the quantities required by its contract, but explained that the failure to do so was due to business conditions, promising that appellee would make up its arrears in the fall, when conditions were expected to improve (R. 42).

Appellee, however, continued in default. In September 1932, Mr. Goodenough again communicated with Mr. Elkind and called the latter's attention to the situation, pointing out that appellee was in arrears. Further assurances were given that appellee would make up its arrears shortly. These promises, however, were not fulfilled. Consequently, in December 1932, Mr. Goodenough arranged a conference with Mr. Elkind, at the latter's office, for the purpose of discussing the situation, with a view towards having appellee meet its arrears, in accordance with the promises and assurances theretofore given (R. 42).

The conference was held on December 5th, 1932. Mr. Goodenough and Mr. Hayes, petitioner's New York sales manager, were present as the latter's representatives. Mr. Elkind and Mr. Couzens represented appellee. Mr. Goodenough pointed out that appellee was far behind its quota and requested that immediate arrangements be made, in accordance with the assurances theretofore given, to eliminate the arrears (R. 42-43).

Then, for the first time, the true reason for appellee's default and its failure to comply with its contract were disclosed. *Mr. Elkind stated that the reason for appellee's continued failure to purchase coal from petitioner in compliance with the contract, was due to the fact that appellee could obtain coal from other sources at prices lower than those required to be paid by the terms of the contract. Mr. Elkind stated further that, unless petitioner modified the existing contract, by reducing the prices of its coal, appellee would not order or purchase any coal from petitioner* (R. 43).

Despite Mr. Goodenough's attempt to persuade Mr. Elkind that appellee should abide by its agreement, Mr. Elkind refused to change his position, and, asserted that appellee would not purchase any more coal from petitioner unless the prices required to be paid under said agreement, were reduced. After conferring with his associates, Mr. Goodenough found that such arrangement could not be made, and finally so advised Mr. Elkind (R. 43).

It is clear that *appellee* intentionally defaulted and then deliberately repudiated its contract, when it could not bludgeon petitioner into meeting its unwarranted and unjustified demand for a price reduction. In this regard it will be noted that the facts concerning appellee's breach and repudiation of the contract as set forth in petitioner's answering affidavits, have never been denied by appellee, although the latter had ample opportunity to do so. Thus, when appellee renewed its motion for a stay, it was fully familiar with petitioner's contentions regarding the default and repudiation. Upon the argument of the first motion for a stay, in April, 1933, petitioner's counsel delivered to appellee's attorney, copies of petitioner's answering affidavits, which were substantially similar in content

to the answering affidavits submitted by petitioner upon the renewal of appellee's application (R. 50).

The latter's failure to take issue with petitioner's version of the default and repudiation of the agreement, either on its first motion, or, when it later renewed its application, must be deemed an admission of the truth of petitioner's charges. Under these circumstances, it is evident that there is no *bona fide* dispute concerning the performance of the contract, referable to the arbitration.

On January 3rd, 1933, when appellee placed an order for a small quantity of coal, it was substantially in default under its contract. Petitioner, however, was willing to fill this order, on condition that its acceptance thereof be without prejudice to its rights under the contract. Since appellee refused to accede to this reasonable request, the shipment was not made (R. 43).

The assertion in the affidavit submitted by Mr. Elkind in support of appellee's application for a stay, to the effect that he advised Mr. Goodenough that appellee was not in default and urged that the question of any existing default be settled in a proper manner, is denied by Mr. Goodenough, who alleges that Mr. Elkind merely stated his concern would not acquiesce in petitioner's suggestion that the shipment of coal be made without prejudice. In this regard, Mr. Elkind stated, according to Mr. Goodenough, that petitioner could either ship the coal or cancel the order. Mr. Goodenough, as appears from his affidavit, thereupon informed Mr. Elkind that petitioner could not make the shipment, unless it be accepted without prejudice to petitioner's rights (R. 44). A letter confirming this position was sent to appellee by petitioner's counsel (R. 37-38).

Appellee's moving papers are noteworthy for a significant omission. Nowhere in the moving affidavits, does there appear any unequivocal assertion that appellee is not in default under its contract. Manifestly, appellee could not truthfully make such assertion, since the undisputed facts show clearly that it was in default to the extent of approximately 16,173 gross tons of coal, when the present action was commenced (R. 41), and that it had repudiated its contract with petitioner, taking the unjustifiable position that it would not perform its agreement, unless the latter complied with its unwarranted and unjustified demand for a price reduction (R. 43).

In opposing appellee's application for a stay, petitioner seasonably urged the objection that a stay should not be granted because there was no arbitrable dispute or controversy between the parties (R. 45-46). Petitioner urged, also, the jurisdictional objection that any application, either to compel arbitration, or to obtain a stay, could be made only in the Supreme Court of the State of New York, in view of the express provisions in the contract requiring not only arbitration to be had in accordance with the statute in that State but application therefor to be made in the State Court (R. 46).

Finally, petitioner pointed out that appellee was not acting in good faith and that it was guilty of laches which barred it from obtaining either arbitration, or a stay pending arbitration (R. 51-52). Since the foregoing objections find ample support in the record, the Court below erred in granting a stay pending arbitration.

POINT I.

The Circuit Court erred in reversing the order which denied defendant's motion for a stay pending arbitration. Since the express provisions of the contract limit the parties, in the event arbitration is desired, to an application to the New York Supreme Court for an order compelling arbitration, in accordance with the Arbitration Law of New York, the Federal Court is not the proper forum to grant a stay pending arbitration.

1.

Courts may not disregard the agreement of parties, designating the forum, or tribunal, where arbitration is to be enforced, and the law under which arbitration shall proceed.

After pointing out that the decisions in the district courts are in conflict upon the proposition (R. 76), the court below ruled that an agreement to submit to arbitration in a foreign court, justifies a stay of an action brought on the contract elsewhere, resting its conclusion upon the authority of several decisions by the English courts. In reaching this conclusion, we believe the court below erred.

We submit that the view taken by the District Court, is the correct one. That court, in denying appellee's motion for a stay, said:

> "To be specifically enforcible in a particular forum an agreement for arbitration must not provide for an arbitration outside the jurisdiction of that forum or under any arbitration law other than the arbitration law of that forum.

Cf. The Beechwood, 35 F. (2d) 41, 42-43; *The Silverbrook,* 18 F. (2d) 144, 145-146; *The Fredensbro,* 18 F. (2d) 983, 984-985. For otherwise the Court which specifically enforces the arbitration agreement would find itself without power adequately to follow up the situation, and see that its order or decree is performed by the party against whom it is made.

Inasmuch as the parties by their agreement have arranged to arbitrate the disputes arising under the contract, which is the subject matter of this suit, and have contractually agreed on the forum in which that arbitration clause is to be enforced, I think that the proper procedure for me to follow is to deny the defendant's motion in this cause for a stay pending arbitration, and to leave it to the remedies of which it may be able to avail itself in the New York Supreme Court under the Arbitration Law of New York State" (R. 62-63).

The arbitration clause involved in the case at bar expressly provides that, in the event arbitration is desired, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of the arbitration clause, in accordance with the Arbitration Law of the State of New York (R. 31). By reason of this provision, it is evident that the parties have agreed upon the forum to which application may be made, and the law which shall govern. Clearly, since the parties designated the particular forum to which application to compel arbitration should be made, and the law under which such arbitration should proceed, it cannot now be urged that arbitration, *or relief incidental thereto,* may be sought in some other forum and under some other law than that agreed upon by the parties.

To sustain such contention would require rewriting the contract and making a new agreement for the parties. The plain intent of the parties, however, may not be disregarded, and, the court may not make a new contract, under the guise of construing or interpreting the agreement (*Magna Fire Ins. Co.* v. *Pospisil,* 52 F. (2d) 709, 711; *Kearns-Gorsuch Co.* v. *Hartford-Fairmont Co.,* 1 F. (2d) 318, 319; *Schoonmaker* v. *Hoyt,* 148 N. Y. 425, 431).

The parties to a contract must abide by the terms thereof, and the mere fact that one of them subsequently deems his bargain a bad one, or disadvantageous, does not justify the court in permitting a repudiation of the unsatisfactory terms, nor does it warrant the court in making a new agreement by a process of construction or implication (*Rosenthal* v. *American Bonding Co.,* 207 N. Y. 162, 168-169; *Lockwood* v. *Embalmers Supply Co.,* 233 App. Div. 180, 194).

In view of the principles enunciated by the foregoing authorities, it is clear that the express provisions of the arbitration clause may not be disregarded. By the terms thereof the parties have definitely fixed the Supreme Court of the State of New York as the forum for arbitration, and the Arbitration Act of that State, as the law under which arbitration shall proceed. Their agreement is binding and should not be disregarded either by the parties or by the court.

In *Gilbert* v. *Burnstine,* 255 N. Y. 348, 354, the court said:

> *"Defendants' agreement without reservation to arbitrate in London according to the English statute necessarily implied a submission to the procedure whereby that law is there enforced. Otherwise the inference must be*

drawn that they never intended to abide by their pledge. They contracted that the machinery by which their arbitration might proceed would be foreign machinery operating from the foreign court. No other fair conclusion can be drawn from their language. Their contract constitutes something more than a simple executory one subject to breach. Not only under the foreign statute but also under our own arbitration law, it has become irrevocable in the sense that one of the parties without the consent of the other cannot deprive it of its enforcibility.

* * * * * * *

Contracts made by mature men who are not wards of the court should, in the absence of potent objection, be enforced. Pretexts to evade them should not be sought." (Italics ours.)

The *Gilbert* case is not distinguishable in principle from the case at bar. In both cases, the parties expressly fixed the forum and the law under which arbitration should be had. In the instant case, the arbitration clause provides that, in the event arbitration is to be had, it shall be upon application to the State court and in accordance with the State Act. Applying the maxim *expressio unius est exclusio alterius,* it follows that any other forum or law than the one specified, must be excluded.

In *Matter of Marchant* v. *Mead-Morrison M. Co.,* 252 N. Y. 284, the court recognized the principle that where the parties have agreed upon the locality where arbitration is to proceed, their agreement must be recognized by the court. In the *Marchant* case, the defendant, who had been directed to submit to arbitration, subsequently appealed from a judgment which

sustained in part an award of the arbitrators holding that defendant breached its contract. On appeal, defendant argued that the order directing arbitration was void because the parties to the contract, in agreeing to arbitrate their differences, had in view an arbitration in Massachusetts, and not performance elsewhere.

An appeal had been taken by the defendant from the order directing arbitration, but the Appellate Division affirmed the order compelling defendant to submit to arbitration, and, leave to appeal to the Court of Appeals was denied.

In the *Marchant* case, the contract was closed in Massachusetts and in that State the tractors, which were the subject of the contract, were to be manufactured and delivered. Unlike the agreement in the instant case, the contract in the *Marchant* case did not specify the jurisdiction, or the tribunal, where arbitration should be had. The Court of Appeals, upon the appeal from the judgment, sustaining in part the award of the arbitrators, held that the order directing arbitration was not void, and, therefore, could not be assailed collaterally on the appeal then before it. The court, per Cardozo, *Ch. J.*, did say, however, in the following significant language, at page 293:

> "The statute of New York does not bring into being the contract into being, but adds a new implement, the remedy of specific performance, for its more effectual enforcement. This remedy may lawfully be extended to contracts of manufacture made in Massachusetts and there to be performed, *unless it is one of the terms of the arbitration clause, implied if not expressed, that the arbitration shall proceed in a particular locality.*" (Italics ours.)

In the case at bar, the contract expressly provides that, in the event either of the parties is compelled to obtain the sanction of a court, in order to enforce arbitration, application is to be made to the Supreme Court of the State of New York for an order compelling arbitration in accordance with the arbitration laws of that State (R. 31). In view of this limitation, and in the light of the rule enunciated by the foregoing authorities, it is clear that, in the event either party sought relief relating to arbitration, it was limited to an application to the New York Supreme Court. Consequently, the Circuit Court was not justified in entertaining appellee's application for a stay pending arbitration, but should have followed the District Court's determination, denying the application without prejudice to a renewal thereof in the proper tribunal—the New York Supreme Court.

It was suggested by appellee in the lower courts that, as the contract in question was made in New York, and was to be performed partly in that State, the contracting parties had in mind the benefits of the New York statute, but in no way intended to exclude any other forum or the Arbitration Act of any other jurisdiction. In view of the express limitations in the arbitration clause under discussion, it is wholly unnecessary to speculate upon the motives, intent or purpose of the contracting parties. Where, as in the case at bar, the language in the contract is clear and unambiguous, the court is not justified in ignoring it, or seeking to extend it beyond its plain meaning (*Graham* v. *Insurance Co.*, 43 F. [2d] 673, 674; *Hunt* v. *Triplex Safety Glass Co.*, 60 F. [2d] 92, 94).

The suggestion that neither of the parties had the Federal Arbitration Act in mind and did not consider the fact that one of the parties was a non-resident of

New York and so might sue in the Federal Courts, is purely speculative. The contract was approved by counsel (R. 32). It is fair to infer, therefore, that the parties were fully and properly advised regarding their rights and remedies. The court cannot speculate as to the reasonableness, or importance, of the limitations agreed upon by the parties, but must enforce them as found (*Burrows & Kenyon* v. *Warren,* 9 F. [2d] 1, 5).

It is not unreasonable or unfair to infer that the parties deliberately intended to confine themselves to the Arbitration Law of the State of New York and to the courts of that State, in the event arbitration were had. It is quite conceivable that the parties discussed the advantages and disadvantages of arbitration in different forums and under different statutes, and decided upon the courts and laws of the State of New York. However, speculation and conjecture are unnecessary. The parties agreed upon the forum and statute, and any deviation from their agreement is unjustified, either upon the facts or as a matter of law.

2.

Courts will not enforce performance of agreements that require arbitration to proceed in another jurisdiction.

It is well settled that a court will not enforce performance of an agreement requiring arbitration to proceed in another jurisdiction. Thus, in *Matter of Inter-Ocean Food Products Inc.,* 206 App. Div. 426, 432-433, the court, in reversing an order which directed arbitration to proceed without the State, said:

> "The general trend of authority, it seems to me, is that no court will willingly relinquish

> jurisdiction over controversies arising between those who are amenable to its judgment, *nor will any sovereignty order its citizens or subjects to go before the tribunals of another sovereignty and submit to its jurisdiction that their differences may be adjudicated.*
>
> I am of the opinion that while an agreement to arbitrate in a foreign jurisdiction, and before a foreign arbitrator is not invalid or illegal, it cannot be enforced as between citizens of this State who are parties thereto, by compelling them to go without the State, in a foreign jurisdiction and before a foreign tribunal, there to arbitrate their disputes." (Italics ours.)

The court added that, in its opinion, a stay proceedings could be granted under the circumstances presented, but since this question had not been raised, it is evident the court's expression of opinion was merely dictum.

In *Matter of California Packing Corp.,* 121 Misc. 212, 213, the court, in considering a similar situation, ruled as follows:

> "I do not believe under the Arbitration Law this court may compel the respondent to arbitrate before a foreign corporation without the state, for the reason that no award taken without the state may be the basis of a judgment."

Other authorities to the same effect are:

> *The Silverbrook,* 18 F. (2d) 144, 147;
> *U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.,* 222 Fed. 1006.

3.

The granting of a stay pending arbitration is an indirect method of compelling arbitration, and, therefore, should be limited to cases where the court has the power to compel arbitration.

A stay, manifestly, is a coercive measure. It prohibits further proceedings until the party stayed complies with the terms upon which it was granted. Hence, where proceedings are stayed pending arbitration, the party against whom the stay is directed, is compelled to arbitrate, if he desires relief. Obviously, such stay is an indirect method of enforcing arbitration.

However, since a court may not enforce an agreement that requires arbitration to proceed in another jurisdiction, it would be inconsistent to hold it may grant a stay, under such agreement, pending arbitration. Clearly, a stay under such circumstances permits the accomplishment, indirectly, of an act that the court could not directly require to be performed. Consequently, the granting of a stay pending arbitration of necessity, must be limited to cases where the court can compel arbitration.

In the case at bar, the court could not compel arbitration since the agreement of the parties required arbitration to proceed in the tribunal of another jurisdiction. Hence, the court had no power to grant a stay pending arbitration, since the granting of such relief constituted an indirect method of enforcing arbitration.

4.

The granting of a stay under the United States Arbitration Act is limited to cases where the court could compel arbitration.

Appellee may not invoke the Federal Arbitration Act as a basis for obtaining relief pertaining to arbitration, because that Act applies only to arbitration agreements that can be performed under the jurisdiction of the United States courts, and, which do not require a submission to some other tribunal and under a different statute. Section 3 of the Federal Act provides that a stay may be granted in any suit or proceeding brought in any of the courts of the United States, where an arbitrable issue exists, if the Court be satisfied that the issue involved is referable to arbitration under the agreement between the parties.

Section 4 gives the Federal Court power to compel arbitration where it would have had jurisdiction at law, in equity or in admiralty, save for the arbitration agreement.

These two sections must be read together. Thus considered, it is evident that the agreement to arbitrate, referred to in Section 3, upon which the court could grant a stay, is an agreement that the court would have the power to enforce under Section 4. However, under Section 4, a Federal Court cannot compel arbitration where the agreement requires that the proceeding be had in a different forum and under a specific State statute, both upon general principles which prohibit a court from enforcing an agreement that calls for arbitration in another jurisdiction, and, by virtue of the requirement in Section 4, limiting the court's jurisdiction to proceedings held within the

district in which the petition for an order directing such arbitration is filed. It follows that the court lacks the power to grant a stay, pending arbitration in a case, such as that at bar, where the agreement requires arbitration to be held in another jurisdiction.

A similar situation was presented in *The Silverbrook,* 18 F. [2d] 144, where the parties had expressly agreed that their differences were to be arbitrated in London in accordance with the English laws. In denying an application for a stay, pending arbitration, the court said at page 146:

> "It is plain enough that Congress intended to abolish the old rule, established in the jurisprudence, by which the federal courts refused to enforce arbitration agreements. But, however, the act seems to contemplate only such arbitration agreements as would be or could be carried out in the United States, within the jurisdiction of *and under the control and orders of the United States courts,* and therefore it provided in specific and limited terms the character of agreements by which, and the manner in which, parties can provide for and proceed with arbitration." (Italics ours.)

And at page 147, the court concluded as follows:

> "* * * this court is without jurisdiction to direct the parties to proceed to arbitration as required by the concluding clause of that section, because the place and manner of arbitration prescribed by the terms of the contract, are beyond the jurisdiction of this court, *since the hearings and proceedings thereunder cannot be held conformable to the terms of this statute,* and particularly to Section 4, which requires

> the arbitration to proceed within the district in which the petition for an order directing such arbitration was filed." (Italics ours.)

See also:

The Beechwood, 35 F. [2d] 41, 42-43.

In the *Beechwood* case, *supra,* the court pointed that, under well settled rules, the general language of the Federal Arbitration Act must be deemed limited in application, so as not to embrace arbitrations beyond the court's jurisdiction. Clearly, it is essential to the granting of a stay pending arbitration, by a Federal court, that the arbitration agreement provide for arbitration within the jurisdiction of and under the control and order of such court. Where, as in the instant case, arbitration is to be had in another forum, and under another law, it is beyond the power of the Federal court, either on common law principles or under the Federal Arbitration Act, to grant a stay of proceedings pending arbitration.

It is true that in the English cases relied upon by the Circuit Court (*Law* v. *Garrett,* L. R. 8 Ch. Div. 26 [C. A.]; *Austrian, etc. Co.* v. *Graham, etc. Society,* L. R. [1903] 1 K. B. 249; *Kirchner* v. *Graham* [1909], 1 Ch. Div. 413; *The Cap Blanco* [1913], Pr. Div. 130), stays were granted under arbitration agreements which required the parties to submit to a foreign court. In these cases, however, stays were granted because under the English Arbitration Act a stay of proceedings is the only method available for the specific enforcement of arbitration agreements. The English Act contains no other provision for the enforcement of arbitration, and, unlike the United States Arbitration Act, contains no clause which limits the granting of a stay to cases where the court has the power to compel arbitration.

We submit that the power to grant a stay is incidental to and dependent upon the right to compel arbitration. It would be anomalous to hold that a court has the right to grant incidental relief, but no final relief. If the court lacks the power to enforce arbitration and follow the award to judgment—and this proposition, we believe, is clearly established—then, manifestly, it has no power to grant incidental relief, such as a stay pending arbitration.

In *The Silverbrook, supra,* page 147, it was said:

> "This court cannot direct and otherwise supervise and conclude an arbitration to be held in London, or assume to vacate, modify, or correct any award that might be made there. * * * *Nor has it power as a court of admiralty to arbitrarily reform, or modify the terms of the contract by ordering an arbitration elsewhere or otherwise than agreed upon by the parties.*
>
> *Accordingly the motion to stay proceedings will be denied,* and the cause will proceed in the usual course on the merits." (Italics ours.)

In the light of the foregoing authorities and the express limitations of the arbitration clause involved in the instant case, it is clear that the Circuit Court was without jurisdiction either to compel arbitration, or grant a stay pending arbitration.

5.

The State Arbitration Act may not be invoked as a basis for granting a stay in this action.

In the court below it was urged by appellee that the District Court could grant a stay pending arbitration, under the provisions of the New York

statute. This contention is untenable. It has been held that a Federal court cannot enforce or grant relief under a state remedial statute. Thus, in *California Prune & Apricot Growers Assn.* v. *Catz American Co.,* 60 F. (2d) 788, the plaintiff appealed from an order directing it to proceed to arbitration in accordance with the terms of a certain agreement, which required that defendant purchase from plaintiff the latter's entire stock of 1926 California prunes. The contract provided further that any disputes arising under the agreement be settled by arbitration before the Dried Fruit Association of California.

In reversing the order appealed from and denying the petition for arbitration, the Circuit Court held that a Federal court has no jurisdiction to compel arbitration in accordance with a state statute, since such statute is purely remedial and creates no substantive rights which could be enforced by the Federal court, despite the provisions of the Conformity Act.

And in *Lappe* v. *Wilcox,* 14 F. (2d) 861, the court specifically held that a Federal court could not grant a stay of proceedings under the New York State Arbitration Act. Thus, in denying the defendant's petition for a stay, the court said, at page 864, referring to the State Act:

> "And further there is nothing in the statute which suggests that it was intended to be extended beyond the courts of the state. While the statute does not in so many words refer or limit its provisions to state courts, that is its plain intent. Section 5, providing for staying the action expressly says: 'The Supreme Court [of New York State] or a judge thereof' shall grant such stay."

POINT II.

No arbitrable dispute exists between the parties. Consequently, neither arbitration nor a stay pending arbitration may be had.

Appellee's application for a stay was predicated upon the assumption that disputes existed between the parties, which, under the terms of the contract, required arbitration. In this connection, it should be noted that appellee's moving papers do not specify the matters which it claims should have been arbitrated. In the briefs submitted in the lower courts, appellee enumerated a number of purported issues, which it claimed constituted proper subject matter for arbitration. Before considering the validity of the issues thus suggested, it is appropriate to inquire generally concerning the nature of the dispute which must exist, before arbitration may be invoked.

Frivolous or unconscionable issues may not be presented by a party as the basis for arbitration. Some degree of merit must attach to the matters concerning which arbitration is sought. Where a palpably fictitious, or unfounded claim is asserted, an arbitrable issue is not presented.

Thus, in *Matter of Wenger & Co.,* 239 N. Y. 199, 202, the Court said:

> "Unquestionably a claim may be so unconscionable or a defense so frivolous as to justify the court in refusing to order the parties to proceed to arbitration * * *."

Even the Federal Arbitration Act (9 U. S. C. A., Sections 3 and 4) requires that the court be satisfied

that an issue is involved which is referable to arbitration, before it may grant a stay.

In the instant case, we submit that an analysis of the record readily discloses the absence of any *genuine* issue which could constitute the basis for arbitration. In considering the validity of any purported disputes, suggested by appellee, it should be borne in mind that the allegations of petitioner's answering affidavits, concerning appellee's breach and repudiation of the contract, are uncontradicted.

In this connection, it will be noted that petitioner commenced the present action only after it appeared that appellee had no intention of fulfilling its obligations under the contract. Thus, when suit was commenced, appellee was in default to the extent of approximately 16,173 gross tons of coal (R. 41). In other words, up to the time the action was commenced, appellee had ordered only approximately fifty per cent. of the contract requirements. Furthermore, suit was commenced only after appellee's unequivocal refusal to continue to order and purchase coal, as required by its agreement. In view of these circumstances, it is manifest that appellee's conduct constituted an anticipatory breach of contract which warranted the immediate commencement of the present action.

The Circuit Court, although refusing to hold that there can never be a breach so plain that the promisee may not have summary judgment, even in the face of an arbitration clause, concluded that, upon the facts in the case at bar, appellee had not repudiated the contract (R. 79). This conclusion overlooks the uncontradicted assertion in petitioner's answering affidavits that appellee's officers at the conference held on December 5th, 1932, unequivocally stated that they would not order or purchase coal from petitioner un-

less the latter agreed to a price reduction (R. 43), and appellee's admitted default. Clearly, the stand taken by appellee constituted a repudiation which warranted petitioner in treating the contract at an end, and commencing the present action. Similarly, appellee's default justified petitioner in treating the contract as definitely breached by the former.

In *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, 589, this court said:

> "It is no longer open to question in this court that, as a rule, where a party bound by an executory contract repudiates his obligation * * * the promisee has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anticipatory breach."

In *Roehm* v. *Horst,* 178 U. S. 1, this court said, at page 8:

> "It is not disputed * * * also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly."

And at page 20, the court added:

> "If in this case these ten hop contracts had been written into one contract for the supply of hops for five years in installments, then when the default happened in October 1896, it cannot be denied that an immediate action could have been brought in which damages could have been recovered in advance for the breach of

the agreement to deliver during the two remaining years."

Other authorities to the same effect are:

Bu-Vi-Bar Petroleum Corp. v. *Krow,* 40 F. (2d) 488, 490, 493;
American Can Co. v. *Garnett,* 279 Fed. 722, 724;
Dixon v. *Anderson,* 252 Fed. 694, 695;
Henderson, etc. v. *Wilson & Co.,* 235 N. Y. 489, 499.

Upon the undisputed facts and in the light of the foregoing authorities, it is submitted that petitioner's right to recover damages for appellee's breach and repudiation of the contract, is clear, and, that the only question which remains for determination is the amount of such damages. This issue, however, as we will hereinafter demonstrate, does not constitute an arbitrable dispute.

It was suggested by appellee, in the court below, that the question concerning its shortage in orders for coal, raises an issue which requires arbitration. This contention was predicated upon a suggested ambiguity as to the meaning of the language in the contract requiring that the orders for coal, during the three to five-year period of the contract, be "in as nearly equal monthly instalments as is practicable" and "spread over such period * * * in as even a manner as is practicable" (R. 27).

Thus, appellee stressed the phrase "in as even a manner as practicable", and, failing to give due regard to the requirement that the orders be "in as nearly equal monthly instalments as is practicable", urged that it had a period of five years within which to take the specified quantity of coal. In this regard, appellee contended that it had the right to delay order-

ing and purchasing coal until the end of the five-year period.

Manifestly, this construction renders meaningless the provision that the coal be taken "in as nearly equal monthly instalments as is practicable". Giving appellee the benefit of the entire five-year period within which to order and purchase the specified quantity of coal, upon which theory the complaint proceeds, it would appear that appellee was obliged to take approximately 1250 gross tons of coal per month, during the five years.

We do not contend that appellee was obliged to take this exact quantity each month, but it is clear that this was a fixed average which appellee could not minimize substantially during the contract period, without placing itself in default. On this basis, it is undisputed that, at the time the present action was commenced, appellee's arrears aggregated 16,173 gross tons (R. 41). Over a five-year term, appellee, under the express requirements of the contract, was obliged to take approximately 31,250 gross tons, up to the time that this suit was instituted. Appellee, however, has ordered and purchased only approximately fifty per cent. of that quota. In the light of these circumstances, it is obvious that there has been a substantial breach, on the part of appellee, of the requirements of the contract.

If the words "in as nearly equal monthly instalments" are to be given any meaning, they must be interpreted to mean that appellee obliged itself to order and purchase, on the average, approximately 1250 gross tons per month. The provision in question, therefore, rebuts the contention that appellee could refrain from ordering and purchasing coal until a few days prior to the termination of the five-year period.

Were appellee's contention sustained, it would be possible for it to refuse to take in any coal during the first four years and eleven months of the contract period, and then seek to impose upon petitioner the obligation of delivering the entire 75,000 tons during the last month, or carrying petitioner's argument to its logical conclusion, on the last day of the term. It is incredible that the parties intended any such absurd and harsh result. It is well settled that a construction leading to a harsh or unreasonable result will be avoided (*Nicholson Transit Co.* v. *Nicholson, etc. S. S. Co.*, 43 F. [2d] 427, 433; *P. W. Brooks & Co.* v. *North Carolina, etc. Co.*, 37 F. [2d] 220, 223; cert. den. 281 U. S. 741; *Insurance Co.* v. *Concrete Steel Bridge Co.*, 37 F. [2d] 695, 702).

Appellee, having ordered and purchased only fifty per cent. of the contract requirements up to the time that suit was commenced, was clearly in default. Apart from the question of its default, it is uncontradicted that appellee repudiated the contract in December, 1932. Consequently, no legitimate dispute as to its liability for the failure to take the balance of the quota, is presented. The purported issues suggested by appellee, regarding its default and repudiation of the contract, are so palpably sham that they cannot be made the basis for arbitration.

In view of these circumstances, it is evident that petitioner's refusal to ship seven cars of coal, unless such shipment be accepted without prejudice to its rights, does not create an arbitrable dispute, inasmuch as an anticipatory breach had already occurred. Petitioner, therefore, was wholly within its rights in thereafter refusing to make any shipments unless the same were accepted without prejudice. If appellee's order were given in good faith, there was no good reason why it should refuse to accede to petitioner's request

that the shipment be accepted without prejudice to the latter's rights.

It was suggested, also, by appellee that its alleged desire to continue the contract, presented an arbitrable issue. This alleged issue was predicated upon its order for seven cars of coal, in January, 1933. After appellee's repudiation and breach of the contract, petitioner was not required to accept a belated gesture to continue with the contract. Petitioner had the right, upon the occurrence of the breach and repudiation, to take the position that performance of the contract on its part was no longer required and that it could maintain its suit for damages by reason of appellee's breach and repudiation. The latter's belated gesture, obviously made for the purpose of bolstering up its application for a stay, came too late to create an arbitrable issue.

The conclusion is irresistible that appellee breached and repudiated its contract, and, therefore, that there are no substantial or legitimate arbitrable disputes between the parties, concerning the performance of their agreement. Accordingly, the application for a stay should have been denied.

POINT III.

The amount of damage to which petitioner may be entitled by reason of appellee's default and repudiation, does not constitute an arbitrable issue.

As a result of appellee's breach and repudiation of the contract, the only issue that remains for determination is the amount of damage sustained by petitioner. The court below held that this issue alone would be enough to warrant arbitration, if the merits

were otherwise conceded (R. 79). We submit the court erred in its conclusion, first, because a mere assessment of damage, divorced from the determination of any other dispute or controversy between the parties, does not fall within the purview of arbitration, and, secondly, because the arbitration clause does not give the arbitrators power to assess the damage sought to be recovered by plaintiff.

1.

It would appear from the authorities that, where the only duty that arbitrators could perform, is the determination, assessment, or appraisal of damage, arbitration may not be had. The ascertainment or assessment of the damage sustained by a party, is merely incidental and collateral to the main controversy, and is in no wise determinative thereof. Hence, no controversy, within the meaning of the Arbitration Act is presented. The courts have uniformly held that provisions for the ascertainment or assessment of damage do not constitute enforcible arbitrable agreements.

An analogous situation was presented in *Matter of American Insurance Co.,* 208 App. Div. 168. In that case, an appeal was taken from an order directing that the controversy existing between the parties be arbitrated. The application for arbitration was based upon an appraisal clause contained in a policy of insurance. This clause provided that, in the event of disagreement as to the amount of loss or damage, the insured and insurer should each appoint an appraiser, and the appraisers so appointed should appoint an umpire, who, acting with the appraisers, should then determine the amount of loss or damage. In revers-

ing the order granting arbitration and denying the motion, the court said at page 170:

> "*A distinction, however, has invariably been observed between the reference of a collateral or incidental matter of appraisement or calculation, the decision of which is not conclusive as to the ultimate rights of the parties, except the mere matter of amount due, and the submission of all the matters that are in controversy between the parties for final determination upon the whole issue.* The distinction has been preserved because the submission of a collateral fact or of a particular question, without making the whole controversy the subject of the determination of arbitrators, is not deemed a coercive means designed to put an end to the controversy between the contentious parties." (Italics ours.)

And at page 171, the court concluded:

> "The Arbitration Law itself does not extend the hitherto recognized type of arbitration so as to include within its embracement appraisals of incidental matters which are at times provided for in contracts, * * *."

In *Toledo S. S. Co.* v. *Zenith Transportation Co.*, 184 Fed. 391, the court said at page 401:

> "It has been frequently decided that *an agreement to submit to the decision of others a question involving only calculation or appraisement or the fixing of values, and the like, * * * does not constitute an arbitration under the strict rules of the common law.*" (Italics ours.)

Other authorities to the same effect are:

Matter of Fletcher, 237 N. Y. 440, 447;
Matter of Webster v. *Van Allen,* 217 App. Div. 219;
Wurster v. *Armfield,* 175 N. Y. 256, 264;
Grody v. *Silverman,* 222 App. Div. 526, 527;
Williams v. *Ins. Co.,* 118 Misc. 799, 801.

The mere fact that a controversy may exist as to the amount of damage, does not transform an appraisal clause into an arbitration agreement (*Williams* v. *Ins. Co., supra,* 803). Similarly, the mere fact that a controversy may exist in the case at bar concerning the amount of damage to which petitioner is entitled, does not constitute such issue a basis for arbitration.

2.

Another circumstance impelling the conclusion that petitioner's damage does not constitute an arbitrable issue, is the fact that the arbitration clause does not give the arbitrators power to assess damages of the nature sought to be recovered by petitioner. The arbitrators, of course, may not go beyond the limits of the arbitration clause (*Matter of Kelley,* 240 N. Y. 74, 78).

In the case at bar, the jurisdiction of the arbitrators is limited to passing upon disputes as to the performance of the terms of the agreement (R. 31). Such provision, it has been held, does not permit arbitrators to pass upon a claim for special, or consequential, damage, such as claimed by petitioner, in the instant case.

The effect of an arbitration clause, similar in import to that involved in the case at bar, was considered in *Matter of Marchant* v. *Mead-Morrison M. Co.*, 252 N. Y. 284. A comparison of the two clauses will demonstrate their similarity.

Clause in Marchant Case.	*Clause in the Case at Bar.*
"If for any reason any controversy or difference of opinion shall arise as to the construction of the terms and conditions of this contract, *or as to its performance,* it is mutually agreed that the matter in dispute shall be settled by arbitration * * *."	"In case any dispute should arise between the buyer and the seller *as to the performance of any of the terms of this agreement,* such dispute shall be arbitrated * * *."

In the *Marchant* case the Appellate Division modified an award by the arbitrators, by striking out the damage item. The Appellate Division assigned as ground for its decision, that the arbitrators had power only to determine the fact of performance or nonperformance by one party or the other, and that there was no power to assess the damages resulting to the buyer's business by reason of the alleged breach of contract. The plaintiff appealed from this modification to the Court of Appeals. In sustaining the determination of the Appellate Division in so far as it struck out the award of damage, the Court of Appeals said, at page 299:

> "The clause to be interpreted is instinct with tokens of a purpose to encompass the submission with limitations and conditions. *It does not say that any and all controversies growing out of the contract shall be settled by*

arbitration, though the plaintiff would have us hold that its effect is nothing less. The submission is to be confined to controversies or differences of opinion as to 'the construction of the terms and conditions' of the contract, and controversies or differences as to the 'performance' of the contract." (Italics ours.)

And at page 300, the court continued as follows:

"*We think there was no intention to clothe the arbitrators with power to settle every difference having its genesis in the contract.* Their function was more modest. Questions might arise as to the meaning of the contract or the plans and specifications. The arbitrators were to give the answer. Questions might arise as to the performance of covenants and conditions where there was no doubt as to the meaning. Again the arbitrators would answer. If performance had failed in part, there would be questions very often as to the measure of the failure, which would lead to an inquiry as to the diminution in value of the subject-matter of the contract, the worth of what had been done when compared with that omitted. Here again we assume that the arbitrators were expected to estimate the deficiency, and if the price would overpay, to determine the abatement, as upon a claim for recoupment. Reparation *to that extent* would follow as an incident to the power that had been given them to declare the measure of performance.

They undertook to do much more. They did not limit themselves to fixing the value of what had been done as compared with that omitted according to the practice in recoupment (*Mondel* v. *Steel,* 8 M. & W. 858). They charged the dilatory seller with *consequential* damages of

nearly a million dollars on the ground that the effect of the delay was to plunge the buyer into ruin. The rule has long been settled that recoupment in its proper sense does not include a claim for damages purely consequential, but is limited to an allowance for diminution in the value of the subject-matter (*Mondel* v. *Steel, supra,* at pp. 870, 872; Williston on Contracts, Vol. 3, sec. 1464). We think this was the extent of the power of the arbitrators under the submission now before us." (Italics ours.)

And at page 302, the court said:

"*It is not a question whether the damages awarded proceed from the default so directly and certainly that the plaintiff might have recovered them if he had been suing in the courts. * * * It is rather a question whether the damages are of such a nature that arbitrators so commissioned may consider them at all.* One has only to compare this clause with sample clauses quoted in the briefs of counsel for the plaintiff to see how far it falls short of many standard forms that were readily available. Typical of such forms is that of the Chamber of Commerce of this State. It calls for arbitration of 'any dispute arising under, out of, or in connection with or in relation to this contract'. The parties to this controversy had no thought that they were saying the same thing." (Italics ours.)

And at page 303, the court added:

"Weighing these considerations in all their cumulative force, we are brought to the conclusion that the Appellate Division did not err in modifying the judgment by striking out the award of damages. It is a very easy thing for contracting parties to provide in a few words

> for a general arbitration if they are minded so to do. They are not to be trapped by a strained and unnatural construction of words of doubtful import into an abandonment of legal remedies, unwilled and unforeseen."

Under the foregoing ruling, it is evident that arbitrators, proceeding under an arbitration clause of the character presented in the instant case, at most could assess only *general* damages. It is clear, however, that the arbitrators, under such clause, lack the power to assess consequential, or special damage, of the nature sought by petitioner, in the instant case.

The situation presented in the case at bar, in so far as the question of damage is concerned, is similar to that involved in the *Marchant* case. Petitioner, in the instant case does not seek general damage. As a general proposition, it is well settled that the measure of damage for the anticipatory breach of a contract is the difference between the contract price and the cost of performance (*Roehm* v. *Horst,* 178 U. S. 1, 21; *U. S.* v. *Purcell Envelope Co.,* 249 U. S. 313, 320). In the instant case, petitioner seeks to recover as special, or consequential damages, commissions which it would have earned on the sale and delivery of the balance of the coal if appellee had abided by its agreement (R. 9). The arbitration clause here under consideration, is not broad enough to empower the arbitrators to assess damages of the nature sought by petitioner.

In the light of the foregoing authorities, it is clear that the assessment of damage, which is the only issue remaining for determination, cannot be the subject of arbitration. Since there were no other matters referable to arbitration, no basis existed for appellee's motion, and its application for a stay was properly denied by the District Court.

POINT IV.

Appellee waived and abandoned any rights which it possessed under the arbitration clause, by reason of its unreasonable delay and laches.

It is well settled that the right to arbitration may be waived or abandoned by laches, or other conduct inconsistent with an intention to arbitrate. In the instant case, it appears conclusively that appellee has been guilty of unreasonable delay in seeking to enforce its alleged rights under the arbitration clause.

Thus, although the question of appellee's default was called to its attention as early as the spring of 1932, appellee failed to request or compel arbitration, until in March, 1933 (R. 20), it made its present belated application, which was brought on only after petitioner had taken affirmative action. It appears further from appellee's moving papers that, even in January, 1933, its attention was called to petitioner's position concerning appellee's failure to order and purchase coal, in accordance with the provisions of the agreement (R. 23, 36-38). If appellee honestly believed that there existed any issue between the parties, referable to arbitration, it was incumbent upon it, at that time, to demand arbitration.

It appears further that, although again advised of petitioner's position and claims in April, 1933, when appellee's prior application for a stay was argued (R. 50-51), appellee failed to take any affirmative steps to demand or compel arbitration. If appellee actually desired arbitration, manifestly, it had ample opportunity to apply in the proper tribunal for that relief.

Appellee has alleged merely that it was ready and willing to arbitrate the alleged issues between

the parties, but nowhere in its moving papers does it claim that it demanded arbitration or selected an arbitrator. Appellee has been content to stand by idle, without making any effort to obtain arbitration. At no time did it seek to compel arbitration. Appellee requested merely a stay of proceedings until arbitration could be had. Apparently, appellee merely desired to stay petitioner from proceeding further and was content to let the situation remain in such indefinite state. If appellee's protestations that it has been ready and willing to arbitrate, were sincere, it would have long since moved to compel arbitration, and not merely to stay petitioner. It is significant that appellee took no affirmative steps until petitioner commenced this action.

Manifestly, appellee sought to use the Arbitration Act as a means of gaining delay. The court below should not have assisted appellee in accomplishing this object. It was aptly said in *Matter of Zimmerman* v. *Cohen*, 236 N. Y. 15, 20-21:

> "The Arbitration Law was passed to expedite and facilitate the settlement of disputes and overcome the delay caused by litigation. It was not intended that such law should be used as a means of furthering and extending that delay."

Appellee has been guilty of unreasonable delay and procrastination. The Arbitration Act may not be invoked by a party who has been guilty of laches.

In *Nagy* v. *Arcas Brass & Iron Co.*, 242 N. Y. 97, 98, the court said:

> "* * * unreasonable delay in making the proper application may justify a finding of waiver."

And at page 99, the court added:

> "But the Arbitration Law contemplates prompt action and too long a delay in seeking appropriate relief may be easily construed as an indication that this claim is waived."

See also:

> *Grant* v. *Pratt & Lambert,* 110 App. Div. 867, 869, aff'd. 186 N. Y. 611.

The court below held that a mere expression of willingness to submit to arbitration, was a sufficient answer to petitioner's objection that appellee was in default in proceeding with arbitration (R. 78). We submit that a rule which establishes such criterion, is erroneous. Under such rule, it would be possible for a defendant who had been guilty of inexcusable delay and laches to obtain an order staying proceedings, merely upon the bare assertion that he was ready and willing then to proceed with arbitration.

The Federal Arbitration Act (9 U. S. C. A., Sec. 3) provides that the court:

> "* * * shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, *providing the applicant for the stay is not in default in proceeding with such arbitration.*" (Italics ours.)

Clearly, something more than a mere expression of willingness to arbitrate, belatedly made upon an application to obtain a stay, is required of the movant. The latter must adduce *facts* supporting the assertion of readiness and willingness to submit to arbitration. A bare assertion, unaccompanied by any substantiat-

ing facts, is insufficient. In the case at bar, appellee's conduct and actions—or lack of action—belie its assertion of willingness to submit to arbitration.

Both State and Federal Acts require that the party seeking arbitration, or a stay until arbitration is had, act promptly. To grant a stay in the case at bar, in view of appellee's unreasonable and unexplained delay, places a premium on delay in enforcing arbitration, thereby frustrating the purpose and intention of the Arbitration Law, which is to secure a speedy termination of a controversy. Appellee's unreasonable delay in seeking to compel arbitration, constituted a bar to its application for a stay.

POINT V.

The order of the Circuit Court should be reversed, and that of the District Court affirmed.

Respectfully submitted,

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